Supreme Court, U.S.
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No. 91-7749

In The

Supreme Court of the United States

October Term, 1992

JOSE ANTONIO ORTEGA-RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

The government implies that it asked the court of appeals to exercise its discretion to dismiss Petitioner's appeal, under a theory of waiver. *Brief of United States*, p.5, ¶3; pp.8, 26-28. This implication fails to capture the true thrust of the government's argument to the court of appeals, where the government argued that Petitioner "cannot now challenge his conviction . . . " and he is "precluded from appealing his conviction. Consequently, this Court should dismiss the appeal." J.A. 70-71. Indeed, the government's argument was couched in absolute and automatic terms, bordering on a jurisdictional objection: "Appellant, who became a fugitive after being convicted by a jury and before sentencing, cannot now challenge his conviction on appeal." J.A. 70. The court of appeals summarily dismissed without any indication that it exercised discretion, "Appellee's motion to dismiss is GRANTED." J.A. 78.

When Petitioner asked the court of appeals to reconsider dismissal of the appeal, he asked the court to exercise its discretion based upon the facts and circumstances of this case. J.A. 79-84. Once again the government relied upon the near-jurisdictional holding of *Holmes-London*:

> Under the holding in *Holmes*, he is precluded from challenging his 1989 conviction . . .
>
> • • •
>
> According to well-established case law, appellant Jose Antonio Ortega-Rodriguez is precluded from appealing his conviction.

J.A. 88. Based upon this argument, the court of appeals ruled, "Appellant's motion to reinstate appeal is DENIED." J.A. 93.

ARGUMENT

In a complete departure from its arguments before lower courts, the government now freely concedes that the appeal of a former fugitive may not be dismissed automatically. Now, for the first time, the government acknowledges that a decision to dismiss the appeal of a former fugitive must be based upon the court's discretion, considering relevant factors on a case-by-case basis. To this end, the government has conceded the premise of Petitioner's argument before the Court.

The only issue which remains, then, is whether the court of appeals abused its discretion by dismissing the present appeal. Under the particular facts of the present case, it was an abuse of discretion to dismiss the Petitioner's appeal.

I. THE GOVERNMENT HAS CONCEDED THAT A FORMER FUGITIVE DOES NOT AUTOMATICALLY FORFEIT THE RIGHT TO APPEAL HIS CONVICTION.

The Nature of the Government's Concession.

In the district court and in the court of appeals, the government contended that the defendant was "precluded" from an appeal of the judgment of conviction because he was a former fugitive, under the Eleventh

Circuit precedent of *Holmes*[1] and *London*[2]. The government's argument, and the courts' rulings, left no room for discretion.[3] The court of appeals dismissed the appeal on this ground and refused to reinstate the appeal, offering nothing more than a perfunctory order, never indicating it exercised discretion.

The government has now abandoned its argument that Petitioner's appeal of his conviction was "precluded" by Eleventh Circuit precedent. Instead, it has made both explicit and implicit acknowledgments that a former fugitive does not automatically waive the right to appeal his conviction. The concession comes in four forms: (A) the government's restatement of the question presented, (B) the government's reliance upon *Thomas v. Arn*[4], (C) the government's complete reliance on precedent which holds that the decision to dismiss is within the court's discretion, and (D) the government's argument that the *Holmes-London* precedent is not a rigid, automatic rule of dismissal. The reason for the concession is apparent – an automatic rule precluding direct appeal of the conviction of a former fugitive is indefensible.

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[1] *United States v. Holmes*, 680 F.2d 1372 (11th Cir. 1982), *cert. denied*, 460 U.S. 1015 (1983).

[2] *United States v. London*, 723 F.2d 1538 (11th Cir.), *cert. denied*, 467 U.S. 1228 (1984).

[3] J.A. 47-48, 69-71, 78, 87-89, 93.

[4] 474 U.S. 140 (1985).

A. Concession in the Government's Restatement of the Question Presented.

Based upon the government's contention in the lower courts, Petitioner filed the present petition for writ of certiorari, presenting the question: Whether a former fugitive from sentencing must automatically forfeit the right to appeal his conviction. The first indication of the government's concession appears on the first page of its brief, in which it restated the issue:

> Whether a court of appeals *may* dismiss an appeal by a convicted defendant who fled following his conviction but was recaptured and returned to custody 11 months later.

(emphasis added). *Brief of United States*, p. I. Backing away from its earlier contention that the appeal was precluded by virtue of the defendant's prior fugitive status, the government now couches its argument in the permissive "may", defending the dismissal decision as if it was an exercise of discretion.

To the extent the government now concedes that the dismissal decision must be based upon discretion, the government has adopted the position advanced by Petitioner from the outset. To the extent the government presently suggests that the dismissal decision was presented to the Eleventh Circuit, and decided by that court as a matter of discretion, the government's position lacks candor.

B. Concession in Government's Reliance Upon *Thomas v. Arn.*

By relying extensively upon this Court's decision in *Thomas v. Arn*[5], the government is compelled to concede that the decision to dismiss the appeal of a former fugitive is, by necessity, a matter of judicial discretion. In *Arn*, the Court upheld the Sixth Circuit's use of supervisory power to dismiss appeals due to procedural default, where a defendant failed to file timely objections in the district court as required by the Federal Magistrate's Act. The Court, however, took special account of the manner in which the supervisory power is exercised, finding that the practical effect of the rule is not to restrict automatically appellate court jurisdiction:

> [P]etitioner's first contention – that the Court of Appeals has refused to exercise jurisdiction that Congress granted it – is simply inaccurate. The Court of Appeals expressly acknowledged that it had subject-matter jurisdiction over petitioner's appeal. [citation omitted]. The Sixth Circuit has also shown that its rule is not jurisdictional by excusing the procedural default in a recent case. . . . We therefore conclude that neither the intent nor the practical effect of the Sixth Circuit's waiver rule is to restrict the court's own jurisdiction.

Thomas v. Arn, 474 U.S. at 146. In a footnote, the Court observed similar waiver rules exist in other circuits, but "[i]n none of these cases have the courts spoken in jurisdictional terms." *Id.* at 146 n.4. Upholding the waiver

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[5] *Id.*

rule, the Court "emphasize[d] that, because the rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interest of justice." *Id.* at 155.

Unlike in *Arn*, the rule of waiver contained in the Eleventh Circuit's *Holmes-London* precedent effectively restricts the court's jurisdiction. Both the government and the court of appeals speak in terms of "abandoned rights", where a former fugitive is "precluded from appealing his conviction", and where an appellant "cannot now challenge his conviction." And, unlike in *Arn*, the government cannot point to a single instance in which the *Holmes-London* rule of waiver was interpreted to excuse an appellant's prior fugitive status.[6]

Since the waiver rule of *Holmes-London* effectively limits jurisdiction, it cannot be defended by the Court's decision in *Arn*. By the terms of *Arn*, the Eleventh Circuit's rule is indefensible. So the government has attempted to disguise *Holmes-London* and the ruling below as mere exercises of discretion. But any such argument is contradicted by the holding of *Holmes-London*, the motion practice of the government in the courts below, the perfunctory orders of the court of appeals, and the historical application of the rule to "preclude" appeals of convictions.

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[6] If anything, the Eleventh Circuit's interpretation of the *Holmes* fugitive dismissal rule has become jurisdictional. *Cf. United States v. DiBernardo*, 880 F.2d 1216, 1229 (11th Cir. 1989) ("If DiBernardo is a fugitive, then the district court does not have jurisdiction to grant his motion for a new trial.")

C. Concession in Government's Citations of Authority.

The government's brief relies upon 29 decisions, nearly all of which were addressed in Petitioner's initial brief. Other than *Holmes* and *London*, not one of the decisions cited by the government mandates or allows automatic dismissal of the appeal of a former fugitive. Each decision exercises discretion based upon the facts and circumstances of the given case.

D. Concession in Government's Present Interpretation of Eleventh Circuit's *Holmes-London* Precedent.

The holdings of *Holmes* and *London* are unmistakable: "We hold that a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters beyond his control. * * * We hold that Holmes, by becoming a fugitive following his convictions, abandoned his right to pursue this appeal."[7] "The rationale of *Holmes* guides the decision in the present case to the same legal conclusion. It would be anomalous to hold that Holmes lost his right to appeal by fleeing after conviction but that London retains his right to appeal because he fled during trial."[8]

Unable to harmonize *Holmes* and *London* with other federal precedent, the government grasps for any authority which might interpret the Eleventh Circuit dismissal

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[7] *United States v. Holmes*, 680 F.2d at 1373-74.

[8] *United States v. London*, 723 F.2d at 1539.

rule as other than absolute. Without case law to support this interpretation, the government relies upon a footnote in an article written by a young lawyer[9] and twists his actual words to make them say something they do not. In the footnote referenced by the government, the author, Mr. Grippando, said:

> The language of the *Holmes* court is, in some parts of the opinion, sufficiently absolute to suggest that the court intended to establish an automatic rule of dismissal for fugitives' appeals. *See id.* at 1373 ("We hold that a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control."); *id.* at 1374 ("We hold that Holmes, by becoming a fugitive following his convictions, abandoned his right to pursue this appeal.")

Id. at 690 n.161. Having quoted what *Holmes* holds, Mr. Grippando then stated that his interpretation "in the text of this Article, however, comports with the federal courts' well established view that dismissal under *Molinaro*, on which *Holmes* relied, is discretionary, not mandatory." *Id.* Rather than support the government's conclusion that "one commentator has concluded that the rule in *Holmes* was not intended to be inflexible, even with respect to appeals from the underlying conviction"[10], Mr. Grippando was clearly forcing harmony between *Holmes* and

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[9] Grippando, *Fear of Flying – The Fugitive's Fleeting Right To A Federal Appeal*, 54 Fordham L. Rev. 661, 698 n.161 (1986), cited at *Brief of United States*, p. 27 n.6.

[10] *Brief of United States*, p. 27 n.6.

all other federal precedent, to advance his personal thesis that "courts should be more circumspect in dismissing criminal appeals based on the defendant's flight . . . [C]ourts should adopt a more flexible balancing test in considering whether to dismiss a former fugitive's appeal." *Id.* at 691.[11]

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[11] Ironically, the thesis of Mr. Grippando's law review article is completely contrary to the government's position in this case. His thesis, which supports petitioner's claim, is summarized in a single paragraph:

> III. RECOMMENDED APPROACH TO FUGITIVES' AND FORMER FUGITIVES' APPEALS
>
> Because federal courts have a "virtually unflagging obligation" to exercise their appellate jurisdiction, and because the exercise of an inherent power is proper only if necessary to the exercise of all others, courts should be more circumspect in dismissing criminal appeals based on the defendant's flight. In particular, courts should distinguish between defendants who flee after filing a notice of appeal and are not in custody at the time the government moves for dismissal – fugitives – and defendants who flee before seeking appellate review and are within custody at all times during the pendency of their appeal – former fugitives. As to fugitives, a bright line rule of unconditional dismissal with prejudice is appropriate, since the appellant's flight is a direct affront to the appellate court and jeopardizes the viability of the appellate system. As to former fugitives, however, the integrity and viability of the appellate court are not necessarily implicated. Therefore, courts should adopt a more flexible balancing test in considering whether the dismiss a former fugitive's appeal, . . .

Id. at 691. [footnotes omitted].

Left with no authority which interprets *Holmes-London* as a rule of discretion, the government nevertheless speculates about hypothetical applications of the Eleventh Circuit rule:

> It is entirely possible that the Eleventh Circuit would not dismiss the appeal of a defendant who became a fugitive for only a short period and voluntarily returned at a time that had no effect on the disposition of the case in the court of appeals.

Brief of United States, p. 8. The government's speculation is unsupported by the plain language of the decisions, the government's motion practice in the lower courts, or by the orders of the court of appeals.[12]

To be sure, the government acknowledges – or, more aptly, it concedes – that a rule requiring dismissal of the appeals of former fugitives cannot be rigid or automatic. To be sustained as reasonable, such a rule must be based upon thoughtful discretion, considering the facts and circumstances of the given case. Despite its concession, the

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[12] The government asserts that the court of appeals' unelaborated "dismissal order can be assumed to have taken the facts of the case into account." *Brief of United States*, p. 27. The assertion is unreasonable when one considers the government's argument to the court of appeals. In that court, the government moved to dismiss the appeal solely on the ground that the defendant's prior fugitive status "precluded" an appeal. Never once did the government concede to that court that the facts of the case could bear upon the dismissal decision. The court of appeals provided no insight into its decision-making process through its perfunctory order, so it is unfair to assume that the court granted the motion to dismiss on different grounds than were raised in the government's motion.

government fails to apply the specific facts of this appeal to the recognized issues of discretion. When properly applied, it is clear that denial of Petitioner's right of appeal was an abuse of discretion.

II. THE DISMISSAL OF PETITIONER'S APPEAL PURSUANT TO THE *HOLMES-LONDON* PRECEDENT WAS AN ABUSE OF DISCRETION WHICH CANNOT BE DEFENDED AS A REASONABLE EXERCISE OF THE ELEVENTH CIRCUIT'S SUPERVISORY POWER.

A. Dismissal Was An Abuse of Discretion.

Petitioner contends that the decision to dismiss the appeal of a former fugitive should not be automatic, but should be based on discretion exercised in each case individually. The government seemingly has no dispute with this approach, agreeing that "the question for decision in this case reduces to whether it is reasonable for a court of appeals to extend the fugitive-dismissal rule to a case such as this one." *Brief of United States*, p. 12.

To effect the appropriate discretionary analysis, Petitioner has offered three broad categories which encompass all potential issues of concern. *Brief of Petitioner*, pp. 15-17. The government does not dispute or discuss these categories or issues specifically, instead sprinkling issues of concern throughout its brief. The issues raised by the government are, therefore, reorganized as follows, so that the original analytical framework is not lost.

1. **Impact in appellate court.** The government enumerates two factors which should be considered as

impacting on the appellate court: (1) "fugitivity" is disruptive, causing delay and duplication of court effort; (2) a court should not accord a fugitive a forum to litigate when the defendant has not subjected himself to the court's ultimate judgment. These issues do not apply to the present appeal.

The sole issue in Petitioner's appeal involves the sufficiency of evidence to support the convictions.[13] The record of proceedings has been transcribed, prepared and filed with the court of appeals. The court can entertain a meaningful appeal. The court of appeals has not previously undertaken to analyze the sufficiency of evidence against Petitioner, since he was a fugitive during the appeal of his co-defendants. *See United States v. Mieres-Borges*, 919 F.2d 652, 654 n.1 (11th Cir. 1990). If Petitioner had appealed with his co-defendants, the court of appeals would have had to undertake a separate sufficiency-of-evidence analysis at that time. Thus, the court of appeals will undertake the same consideration for this defendant that it would have otherwise, albeit at a later time.[14]

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[13] *See* Brief of Appellant, filed in the Eleventh Circuit Court of Appeals, April 24, 1991.

[14] In a somewhat contradictory argument, the government offers that a former fugitive remains entitled to "pursu[e] a collateral attack on his conviction on grounds that would be available to a defendant who failed to perfect his right to direct review." *Brief of United States*, p.27 n.6. This alternative invokes greater duplication of judicial effort than if the defendant's appeal is heard presently. Collateral attack includes additional proceedings in the trial court and very likely requires the same issues to be addressed in appellate proceedings thereafter, at the instance of whichever party loses in the trial court. Judicial efficiency, it would seem, is best served by having the sufficiency of evidence claim decided in the present appeal.

The defendant has been in custody throughout the entirety of his appeal. He has, therefore, remained subject to the ultimate judgment of the appellate court.

2. **Impact in potential post-appellate proceedings.** The government enumerates only one issue impacting upon post-appellate proceedings, the prejudice which may be sustained by the prosecution in the event a retrial is necessitated. The concern was alleviated in Petitioner's initial brief. If the conviction is reversed on appeal due to insufficiency of evidence, there can be no retrial. *Burks v. United States*, 437 U.S. 1, 18 (1978). The government cannot be prejudiced since it will have no need to call witnesses whose memories have faded, nor to produce evidence which may be lost. If the appeal is unsuccessful, Petitioner is already in custody for the court to effect its judgment and commitment.

3. **Vindicating the authority of law.** Most of the government's justification for a fugitive dismissal rule falls under the general category of the need to vindicate the court's authority. First, it suggests that the rule discourages escapes and encourages voluntary surrenders by escapees. Second, the rule reflects a determination not to extend the benefits of appellate review to fugitives, who have displayed contempt for the court by fleeing. If these issues standing alone are sufficient to allow dismissal of the appeal of a former fugitive, then no former fugitive would ever be allowed an appeal, regardless of other factors. Even the authority relied upon by the government belies this approach.

The precedent relied upon by the government makes clear that these two factors should not alone justify dismissal of an appeal of a person who is then in custody. Each of the decisions acknowledges the need to consider additional facts which, when stirred together, provide a case-by-case basis for deciding when to dismiss an appeal.

In *United States v. Puzzanghera*, 820 F.2d 25 (1st Cir. 1987), the court dismissed the appeal of a defendant who escaped while his appeal was pending. Despite this direct affront to the appellate court, the court of appeals continued to recognize the importance of considering all of the equities before dismissing the appeal of a former fugitive:

> [W]e shall consider the circumstances of each situation, as we have here, before dismissing a recaptured escapee's appeal. We can imagine very unusual cases where equities pertaining to the escape and recapture, *or to the merits of the appeal*, could induce us to retain jurisdiction.

Id. at 27 (emphasis added). Thus, the precedent relied upon by the government acknowledges that the merit of the appeal is an important factor to be weighed before dismissing the appeal.

So too are the court's ability to entertain a meaningful appeal and the possibility that a successful appeal will require a retrial. Thus, in *United States v. Parrish*, 887 F.2d 1107 (D.C. Cir. 1989), the court exercised discretion against hearing an appeal because no meaningful appeal could be entertained, and, if successful, would have required a retrial many years later. Parrish had been a fugitive for 14 years. Some of the factors which guided

the court's discretion to dismiss are: there was no transcript of the trial proceedings, the notes of the court reporter were destroyed after ten years, one of the court reporters is dead, the whereabouts of the other was unknown, the defendant's prior lawyer was retired and maintained no records of the case, and the government would face severe obstacles gathering evidence for a retrial.

United States v. Persico, 853 F.2d 134 (2nd Cir. 1988) was dismissed because the defendant was a fugitive for seven years and sought to appeal an evidentiary ruling which, if successful, would have required a retrial. The court of appeals "exercise[d its] discretion to decline to reach the merits of the claimed error" assigning as one reason "the possibility of prejudice to the prosecution . . . by forcing the government to reprosecute him long after memories have dimmed and evidence has been lost." *Id.* at 137, 138.

The decision to dismiss Petitioner's appeal is also governed by the various factors it presents. The complete record on appeal and Petitioner's initial appellate brief are before the court of appeals. The appeal raises a single issue, the sufficiency of evidence, which has great merit since the court of appeals has already ruled that there is insufficient evidence to convict an identically situated co-defendant.[15] The government has the wherewithal to

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[15] The government continues to dispute the decision of the court of appeals in *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), contending that "it is by no means clear that the court of appeals decided Becerra-Flores' case correctly." *Brief of United States*, p. 28 n.7. Since this Court has denied further

defend the propriety of the conviction, if it can, through reference to the trial record. A meaningful appeal is possible. If the appeal is successful, there can be no retrial, obviating any prejudice to the government which might result if a retrial were allowed.

Also militating against dismissal of the appeal is that the government and district court have already vindicated the authority of law. Petitioner has been separately punished for being a fugitive. He was indicted for, convicted of, and sentenced to a consecutive term of 21 months imprisonment for contempt of court and failure to appear.

Under the circumstances presented in this case, it is an abuse of discretion for Petitioner's appeal to be dismissed.

B. Dismissal of Petitioner's Appeal Pursuant to the *Holmes-London* Precedent Cannot Be Defended As A Reasonable Exercise of the Eleventh Circuit's Supervisory Power.

The supervisory power of the courts of appeals is limited. It cannot conflict with the Constitution or Acts of Congress. *Thomas v. Arn*, 474 U.S. at 148. The power does

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review of that dispute, 111 S.Ct. 1633 (1991), the dispute is over. Despite the government's dispute, the paltry evidence which convicted petitioner is set forth fully at pp. 3-4 of the *Brief of the United States*. The relevance of the dispute to this proceeding is questionable, since Petitioner has not requested for this Court to decide the sufficiency of evidence issue. His only request is that the Court direct the court of appeals to decide the sufficiency claim on direct appeal.

not permit the courts of appeals to restrict their jurisdiction under the guise of procedural rules governing the management of litigation. *See id.* It does not permit the courts of appeals to dismiss automatically a statutorily granted appeal based upon blanket generalizations. Decisions rendered in the form of supervisory power are subject to account for an abuse of discretion. *Cf. id.* at 148.

The Eleventh Circuit's *Holmes-London* precedent cannot be defended as a reasonable exercise of the supervisory power. As written, and as applied, it imposes an automatic forfeiture of a former fugitive's right to appeal. Assuming, for the sake of argument, that the court of appeals privately exercised discretion on this issue, it was a clear abuse of discretion to dismiss Petitioner's appeal.

CONCLUSION

This Court should issue a writ of certiorari directing the court of appeals to consider the merits of Petitioner's appeal of his conviction.

Respectfully submitted,

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